

IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF DELAWARE

RYANAIR DAC,

Plaintiff,

v

BOOKING HOLDINGS INC., BOOKING.COM  
B.V., KAYAK SOFTWARE CORPORATION,  
PRICELINE.COM LLC, and AGODA  
COMPANY PTE. LTD.,

Defendants.

CIVIL ACTION

NO. 20-1191-LPS

Wilmington, Delaware  
Thursday, April 15, 2021  
*Telephonic Oral Argument*

BEFORE: HONORABLE LEONARD P. STARK, Chief Judge

APPEARANCES:

OFFIT KURMAN, P.A.  
BY: R. TOUHEY MYER, ESQ.

and

HOLLAND & KNIGHT LLP  
BY: R. DAVID DONOGHUE, ESQ.  
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Counsel for Plaintiff

RICHARDS, LAYTON & FINGER, P.A  
BY: JEFFREY L. MOYER, ESQ., and  
VALERIE A. CARAS, ESQ.

and

Brian P. Gaffigan  
Official Court Reporter

1       **APPEARANCES:**    (Continued)

2  
3                   **COOLEY LLP**

4           **BY:   JOHN H. HEMANN, ESQ.,**  
5                   **KATHLEEN HARTNETT, ESQ.,**  
6                   **LAUREN POMEROY, ESQ., and**  
7                   **DARINA SHTRAKHMAN, ESQ.**  
8                   **(San Francisco, California)**

9  
10                               **Counsel for Defendants**

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23                               **P R O C E E D I N G S**

24                               **(REPORTER'S NOTE:   The following telephonic oral**  
25                   **argument was held remotely, beginning at 10:10 a.m.)**

1 THE COURT: Good morning, everybody. This is  
2 Judge Stark. Who is there for the plaintiff, please?

3 MR. MYER: Good morning, Your Honor. This is  
4 Touhey Myer from Offit Kurman from Delaware for plaintiff  
5 Ryanair. Also on the line with me today is my co-counsel,  
6 Lisa Kpor, David Donoghue, and Anthony Fuga from Holland &  
7 Knight in Chicago.

8 THE COURT: Thank you very much.

9 And who is there for defendants, please?

10 MR. MOYER: Good morning, Your Honor. It's Jeff  
11 Moyer from Richards Layton & Finger on behalf of defendants.  
12 Your Honor, this morning I have with me my colleague from my  
13 firm, Valerie Caras; and I'd like to introduce my co-counsel  
14 this morning. I have John Hemann, Kathleen Hartnett, Laura  
15 Pomeroy, and Darina Shtrakhman from the Cooley firm. In  
16 addition, we have in-house counsel, Phyllis Wallitt from  
17 Booking Holdings Inc., and Andrew Smith from Kayak Software  
18 Corp.

19 THE COURT: Okay. Thank you very much. And  
20 good morning to all of you.

21 My court reporter, of course, is on the line.  
22 For the record, it is my case of Ryanair DAC vs. Booking  
23 Holdings Inc., et al, Civil Action No. 20-1191-LPS.

24 This is the time we set for argument on the  
25 defendants' motion, so we will hear from defendants first,

1 please.

2 MR. MOYER: Your Honor --

3 MS. HARTNETT: Good morning, Your Honor. Oh,  
4 thank you.

5 MR. MOYER: Go ahead.

6 THE COURT: Good morning. Whoever is going to  
7 speak, let me know who you are, please.

8 MS. HARTNESS: Of course, Your Honor. Hi, I'm  
9 Kathleen Hartnett from Cooley. And I'm appearing today on  
10 behalf of the defendants.

11 THE COURT: Okay. Thank you. Good morning. Go  
12 ahead.

13 MS. HARTNESS: Thank you. We appreciate the  
14 opportunity to be here before you today, and I look forward  
15 to answering the questions you have.

16 As you know, we're here today on defendants'  
17 motion to dismiss the lawsuit or, in the alternative, to stay.

18 There are two independent grounds for dismissal:  
19 the doctrine of forum non conveniens and Rule 12(b)(6).  
20 Specifically, the non-extraterritoriality of the Computer  
21 Fraud and Abuse Act. Our stay request is in the alternative.

22 Absent any initial questions from the Court, I  
23 will first provide some key points of background based on  
24 the complaint and the undisputed record submitted to the  
25 Court in support of the forum non conveniens motion. I will

1 then address why our motion to dismiss should be granted  
2 first based on forum non conveniens and then under 12(b)(6).  
3 And finally, I will turn to the alternative stay request.

4 THE COURT: You can certainly proceed that way.  
5 I may interrupt you with questions, but go right ahead at  
6 this point.

7 MS. HARTNESS: Absolutely. So just as the few  
8 key points of background.

9 Plaintiff Ryanair is a low cost, highly  
10 profitable European airline based in Ireland. It flies only  
11 in Europe and North Africa. It has no flights to any U.S.  
12 location either within the U.S. or internationally, and it  
13 has no operations in the United States.

14 Defendants are four online travel platforms and  
15 their parent, Booking Holdings. Ryanair seeks to hold  
16 defendants liable under the Computer Fraud and Abuse Act,  
17 which I will refer to as the CFA, for what Ryanair calls  
18 screenscraping. And by this, Ryanair is referring to taking  
19 publicly accessible material from a website and using it in  
20 alleged violation of the website terms of use and subsequent  
21 letters sent by Ryanair.

22 Whether screenscraping of public information  
23 from a website violates the CFAA is a question currently  
24 before the Supreme Court, and I'll discuss that in a moment.

25 Importantly, the only connection between this

1 lawsuit and Delaware is that three of the five defendants  
2 are incorporated here. No defendant has operations in  
3 Delaware, and the holdings company, of course, is a holdings  
4 company, not an operating company.

5 One of the defendants, Booking.com is a Dutch  
6 company. And another foreign defendant, Agoda, is  
7 Singaporean.

8 The three U.S. companies operate out of  
9 Connecticut, and that is Priceline, Kayak, and the holdings  
10 company.

11 There has been no evidence identified as being  
12 in Delaware, no witnesses, no allegedly intruding computers,  
13 no allegedly affected customers.

14 Another point of context is the central target  
15 of this lawsuit is Booking.com, the Dutch company. Ryanair  
16 has already sued Booking.com in Ireland for the same nucleus  
17 of conduct, yet Ryanair has let that lawsuit sit dormant at  
18 this point for almost a year and-a-half.

19 Booking.com is a highly successful  
20 European-based hotel booking website that in 2019 got into  
21 the flight itinerary market. Ryanair bristled at this and  
22 sued Booking.com in Ireland for screenscraping.

23 And this is all part of the complaint, Your  
24 Honor. You can see this in Exhibit B to the complaint which  
25 is a letter from Ryanair to Booking.com listing all the ways

1 in which Ryanair believes screenscraping violates Irish law.

2 When Booking.com did not capitulate to Ryanair's  
3 demand, rather than litigate the Irish case, what Ryanair  
4 did was then expedite its threats by attacking Booking.com's  
5 parent and the other travel platform subsidiaries within  
6 the Booking Holdings. And this can be seen in Exhibit C  
7 to the complaint where Ryanair claimed that all of these  
8 entities, which it collectively calls "Booking", are  
9 violating the CFAA by violating Ryanair's website terms of  
10 use and threatening to bring a U.S. suit, and so that is  
11 when this lawsuit followed.

12 I just want to emphasize to show the European  
13 nature of this dispute, and that the U.S. aspect is  
14 incidental at best. Since 2019, Booking.com, the Dutch  
15 company, has sold 55,000 Ryanair itineraries. And this is  
16 in the declarations that we submitted to support our forum  
17 non conveniens motion.

18 We have 55,000 Ryanair itineraries sold by  
19 Booking.com in 2019. And this makes sense because  
20 Booking.com and Ryanair are both European based and Ryanair  
21 flies only in Europe and North Africa.

22 In contrast, Priceline, the American company,  
23 has sold only 2,000 Ryanair itineraries in that time period.  
24 And that is less than .01 percent of Priceline tickets sold  
25 in that time period.

1           You also have Agoda, the Singaporean company,  
2           selling only 95 Ryanair itineraries, none to U.S. customers.

3           Of course, the other two defendants don't sell  
4           flight itineraries.

5           So these numbers are really telling. There are  
6           55,000 Ryanair itineraries from the European defendant  
7           already sued in Ireland, and you have the 2,000 within one  
8           of the U.S. defendants. So this is just a European-based  
9           dispute, and it's about Ryanair's desire to eliminate  
10          perceived competition from Booking.com.

11          THE COURT: All right. Let's talk about that.

12          Is the CFAA limited to sales transactions or  
13          does it also apply to access and interception of data and  
14          then transmission of data?

15          MS. HARTNESS: Your Honor, that's a good  
16          question. And that the focus of the CFAA, the wrong being  
17          addressed by it is an access. In this case, what Ryanair is  
18          alleging is either unauthorized access, that defendant did  
19          not have authority to be on the system at all or exceeding  
20          whatever authorized access it had. So those are its two  
21          core theories of a CFAA violation.

22          And those, of course, occur where the access  
23          takes place. And in this case, that would be Ireland where  
24          the, where the Ryanair computers are located, the servers  
25          that are being allegedly unauthorized -- subject to



1       unauthorized access.

2               THE COURT:   So if that is the case, at minimum  
3       I think you are conceding the sales really aren't the issue;  
4       right?  It's the alleged breach that access that either  
5       exceeded what was authorized or was entirely unauthorized,  
6       it's the access that this case is about.  It's not about  
7       sales, is it?

8               MS. HARTNESS:  Your Honor, the access is the  
9       ultimate, correct, the ultimate wrong that the CFAA would  
10      seek to address.  I think the point about the sales is  
11      simply being representative of how much, if at all, there is  
12      access happening, and from where.

13              And so to the extent, for the forum non conveniens  
14      aspect of our motion, the question is, is there actually --  
15      is this principally a dispute that belongs here or somewhere  
16      else?  And I think our point is that because the computer that  
17      is being allegedly subject to the unlawful access is in  
18      Ireland, and because the large proportion of any such access  
19      is not happening from any United-States-based company, that  
20      this is a dispute that properly should be subject to the  
21      continued litigation in Ireland rather than duplicated here.

22              THE COURT:  All right.  I understand all that,  
23      but if the plaintiff, let's just say evidence ultimately --  
24      I know we're not about evidence today, we're really about  
25      allegations, but if -- let's even say it's a different case.

1 If somebody was shown to be masterminding unauthorized  
2 access of a computer in Ireland but they're doing it here in  
3 Delaware, it's me, let's say. I'm sitting here in Delaware  
4 and I'm unauthorized and/or exceeding my authorization  
5 accessing a computer in Ireland. That's a U.S. case, is  
6 it not? And a case that one would presume, being alleged in  
7 violation of a U.S. statute, would be litigated in the U.S.  
8 Am I right about that?

9 MS. HARTNESS: Your Honor, you're -- I mean  
10 that is obviously, as you said, a totally different case,  
11 but yes, we would have to look and see if, by some chance,  
12 all of the evidence was in Ireland and if the person in  
13 Delaware sitting there was the only connection, but that  
14 would seem to be a weak case for, if at all, a forum non  
15 conveniens argument. It will be a different case with  
16 respect to the potential extraterritorial application of  
17 the CFAA.

18 So for both of our motions, that would be  
19 something that's likely a dispositive distinction from what  
20 we have here.

21 THE COURT: So I should -- you think I should  
22 read this complaint, turning to this case today, not my fake  
23 case, as one that doesn't make any plausible allegations  
24 about defendants doing things in the U.S. to obtain the  
25 access in Ireland. That's the way I should read this

1 complaint?

2 MS. HARTNESS: I do think that is the way you  
3 should read this complaint. And it's the correct way to  
4 read it. Because, you know, it's at the most conclusory  
5 level where the complaint attempts to connect it to the  
6 United States.

7 You have paragraph 25, this is at, where it  
8 says that defendants have committed one or more acts alleged  
9 in this complaint within the state and district. So just a  
10 very generalized, nonspecific allegation.

11 And then you have paragraph 74, which is a  
12 information and belief allegation, not specific to any  
13 defendants, never mind a U.S. defendant, that defendants  
14 used and/or procured, either directly or indirectly,  
15 screenscape content.

16 So that is not an allegation of some domestic  
17 access of a website abroad.

18 And this would stand in contrast, for example,  
19 to the *Apple* case that is cited by Ryanair. There, you have  
20 an allegation that Apple from the United States was kind of  
21 propagating computer updates abroad to computers abroad, and  
22 so that would be a contrasting situation.

23 So the example of the court in *Expedia*, the  
24 *Expedia* case that Ryanair brought there, where the court  
25 was discussing the hypothetical of, you know, you hacking

1 into your neighbor's computer through a server in Ireland or  
2 somewhere else, again, with a domestic nexus.

3 Here, what we have is a complaint. And there  
4 is a reason for it, which is that Ryanair is able to  
5 determine who is accessing its website. We have attached  
6 to the declaration of our Irish counsel that we submitted  
7 in support of our motion an opinion of the Irish courts  
8 in another case called Vola. Vola is a Romanian travel  
9 website, and Ryanair is aggressively pursuing litigation  
10 against that website in Ireland. And we can see from that  
11 case that Ryanair is able to determine who is accessing  
12 its website when it wants to.

13 Here, and this is kind of the final point of  
14 context, in actuality, they can't plead the defendants are  
15 doing this because in reality, if anyone is doing it,  
16 it's third-party aggregators from which of the defendants,  
17 some of them purchase inventory, and it's those entities,  
18 if anyone, that are engaging in access of Ryanair's website.

19 And so the reason why there is an absence of  
20 allegations in the complaint about the actual access of  
21 its website is that were such allegations to be made, it  
22 would be clear that those are allegations involving a U.K.,  
23 a Singaporean, and a Swedish aggregation companies.

24 And just for kind of completeness, the Swedish  
25 company actually has a Finish subsidiary that has also been

1 sued already in Ireland by Ryanair.

2 So this dispute has already been brought in  
3 Ireland against Booking.com and one of the aggregators.  
4 It is kind of sitting there now, and Ryanair is now trying  
5 to allege U.S. claims as well to assert further pressure,  
6 but I would just submit to you that the complaint is quite  
7 cursory and incomplete because if you were to have the  
8 whole story actually pled, it would become even more evident  
9 that this is a forum dispute.

10 THE COURT: Let's talk about the terms of use.  
11 There seems to be a dispute as to whether that is central  
12 to the plaintiff's allegations or arguably irrelevant in  
13 the sense of the plaintiff says that if we struck all of  
14 the allegations in the complaint that relate to the alleged  
15 violation of the terms of use, they would still state a  
16 complaint. Are they wrong about that?

17 MS. HARTNESS: They're completely wrong about  
18 that. The terms of use -- and I think this is something  
19 that, you know, because the terms of use are governed by  
20 Irish law, we understand why Ryanair is now trying to  
21 distance from them.

22 But if Your Honor, you know, both looks at the  
23 complaint itself, which is infused with -- so the entire  
24 idea of the CFAA violation is that you do not have  
25 authorization or you exceed whatever authorization you have.

1 The whole theory of the case here is that users of the  
2 Ryanair website were given some authorization by the terms  
3 of use and, according to Ryanair, defendants exceeded that  
4 authorization or violated it by doing the actions that  
5 Ryanair alleges. So the terms of use provide the source  
6 of the authorization or the lack thereafter.

7 And then there are these letters that Ryanair  
8 sent afterwards underscoring to the defendants its belief  
9 that the terms of use prohibited this conduct and also  
10 saying to stay off the website, you know, through a letter  
11 as well -- a letter flowing from what Ryanair claims are  
12 the rights it has from the terms of use.

13 So it cannot be more clear from both the  
14 letters that are attached to Ryanair's complaint which are  
15 completely framed around the terms of use and the complaint  
16 itself, which, you know, you can see it yourself. But  
17 paragraphs 41 to 64 discuss the terms of use at length.  
18 They then have central allegations, like in paragraphs  
19 73 and 99 are ones that basically say that the lack of  
20 authorization is flowing from the terms of use. And then  
21 you have paragraphs 103 and 104 saying that the terms of  
22 use are violated.

23 So there is other stuff in the complaint that is  
24 all either background or sort of screenshots leading up to  
25 the punchline, which is that the terms of use do not permit

1 this, but this is a case about whether website terms of use  
2 authorize this and whether they're permitted to do so under  
3 the CFAA.

4 THE COURT: Could the letters be a basis for  
5 stating a CFAA complaint independent of the terms of use or  
6 do you say as a matter of law it's not possible?

7 MS. HARTNESS: So I think from our perspective  
8 that is not possible. That was not in any way the basis of  
9 our 12(b)(6) motion yet. I think we reserve the right to  
10 bring a motion for judgment on the pleadings or another  
11 motion at the appropriate time.

12 This exactly the question that the Supreme Court  
13 may ultimately consider in the *LinkedIn v hiQ* case. And  
14 there, you had both -- it's almost -- other than some  
15 factual differences, it's the same exact scenario, which is  
16 a party being told to stay off the website through terms of  
17 use, and that it's being told through a letter, too; and the  
18 question being whether that is actually something that can a  
19 party essentially set up a CFAA violation by another party  
20 that way.

21 So I think we would resist the notion that the  
22 letter can be a basis for a CFAA violation, but that is not  
23 precisely the basis of our motion today.

24 THE COURT: Okay. Thank you.

25 MS. HARTNESS: But just, you know, going back,

1 I do think, and I'm sure you looked at it, but just the  
2 letters setting up the dispute which quotes from the terms  
3 of use at length, and the letters are not some independent  
4 source of law they're seeking to use against defendants  
5 but rather they are marshaling the terms of use to explain  
6 why they believe that the defendants should stay off and,  
7 therefore, it's just hard to conceive of what this case  
8 would be if the terms of use were stripped from the case  
9 because that is where it all begins and ends.

10 THE COURT: Let me just -- I know it's going  
11 to come up. The plaintiff at the very end, maybe their  
12 last line of their brief, ask for leave to amend, if I'm  
13 potentially persuaded on some of your points about I think  
14 the CFAA, as I don't see how an amendment would deal with  
15 you stay request or the forum non conveniens point, but  
16 we're mostly focused so far on this discussion on the CFAA.

17 Do the defendants oppose amendment on the  
18 assumption, just an assumption for the moment, that you  
19 don't persuade me on the stay or the forum non conveniens?  
20 In that world, what is your position on whether what some  
21 of your arguments are, these allegations are conclusory,  
22 they're cursory, they're incomplete. Do you oppose me  
23 giving the plaintiff a chance to try again and state a  
24 claim?

25 MS. HARTNESS: Thank you, Your Honor. We don't



1 think an amendment is appropriate or should be allowed here  
2 because the complaint has been artfully pled in the first  
3 place to try to avoid asserting what they could have  
4 asserted before, more specifics about who is accessing their  
5 website, if anyone.

6 And we would also submit the forum non  
7 conveniens presentation that we have made to the Court  
8 is essentially un rebutted. We've explained that these  
9 aggregators, if anyone, are accessing Ryanair's website, and  
10 so there had been no responsive submission by Ryanair. It  
11 had a chance to do so. And so I think that, too, shows the  
12 futility. So we would submit in this, with the benefit of  
13 that additional context, we would submit that allowing  
14 amendment would not be appropriate.

15 THE COURT: Well, why don't we talk a little  
16 more then about forum non conveniens. It's a burden on you,  
17 and I think it's a fairly significant burden.

18 What have you shown me to show me that the  
19 remedy in the Irish court would be adequate?

20 MS. HARTNESS: Thank you, Your Honor. And  
21 we are familiar with your prior rulings in this area and  
22 appreciate that it is our burden to make the forum non  
23 conveniens showing, and also that it's a weighty one.

24 I'm familiar with we both have to show the  
25 adequacy of the alternative forum and then convince you

1       that the public and private interest factors outweigh the  
2       plaintiff's forum choice, so we appreciate that.

3               In terms of adequate forum, I think we have  
4       clearly made that showing. To be clear, the forum non  
5       conveniens is not a doctrine to say get rid of this case  
6       and they can't bring it anywhere. It's just about what  
7       forum is appropriate.

8               And here, they've actually brought the case in  
9       Ireland. Now, it's not -- they've not pursued it, so it's  
10      not like they're saying that they have come to a point of  
11      achieving their remedy, but we have unrebutted affidavits  
12      from our Irish counsel as well as all the defendants before  
13      the Court, but we have their other complaint, and that is  
14      back to their own exhibit to the complaint, Exhibit B, which  
15      is a letter from Ryanair to Booking.com at the same time  
16      that they were filing that initial suit setting forth all  
17      the ways in which screenscraping allegedly violates Irish law.

18              And so, again, that is their allegations. That  
19      hasn't been litigated yet in Ireland. But this letter  
20      itself is full of explanation from Ryanair itself as to how  
21      the conduct, the conduct has a remedy available in Ireland  
22      with emphasis, I should say, in that letter about how Irish  
23      courts have jurisdiction over all these actions under its  
24      own terms of use.

25              So I think Exhibit B to the complaint is --

1           THE COURT: Okay. But I can see how that seems to  
2 be an entirely plausible reading of their conduct and whether  
3 or not Ireland is an adequate forum with an adequate remedy,  
4 but it doesn't seem to me that it's the only reading. They  
5 only sued one of the five defendants in Ireland and, as you  
6 say, the case for whatever reason hasn't progressed.

7           Isn't it a plausible reading of all this that  
8 rather than trying to abuse your client, they made a  
9 determination that they can't get an adequate remedy in  
10 Ireland and they found another proper forum which is this  
11 court?

12          MS. HARTNESS: Your Honor, I actually don't  
13 think that that is the right kind of looking at both the  
14 series of actions in our case, including this, filing  
15 this suit, letting it sit, and then coming to bring this  
16 additional suit and asking us basically to kind of settle  
17 again, and we just have two suits of the pressure rather  
18 than one.

19          So I don't think there is any reason to believe  
20 that they have any lack of confidence in their Irish theory  
21 that they set forth in this letter to Booking.com. But I do  
22 think that the Vola case, which again is submitted as an  
23 exhibit to our Irish counsel declaration -- so this is ECF  
24 17, and there is an exhibit there which is a somewhat long  
25 decision of the Irish court, but I think that actually

1     importantly shows, and this Vola again is a Romanian travel  
2     website, so it's again the Booking.com of Romania or it's  
3     an online travel agency in Romania. And there, that is a  
4     jurisdictional ruling that we submitted where they were able  
5     to -- Ryanair was able to bring this Romanian travel agent  
6     into an Irish court and that under similar claims that it  
7     was threatening again Booking.com and it is now actively  
8     litigating that case in Ireland. So they have jurisdiction  
9     and now it's going through litigation.

10           So it could easily be doing the same thing for  
11     us. There is no, nothing in the record for us to discern  
12     that Booking -- sorry, that Ryanair lacks confidence in its  
13     Irish theories. And, moreover, it's, you know, Vola is not  
14     alone. Ryanair has not -- Ryanair has sued other defendants  
15     in Ireland for screenscraping.

16           So I think what we have here is a -- this is  
17     not a situation like some of the ones in the cases you  
18     faced where we -- you have previously faced where you are  
19     concerned that there is that corpus that is actually just  
20     not doable or that there is some reason to believe there is  
21     not a cause of action available.

22           Here, defendants have acceded to that forum.  
23     They said that they will be amenable to appear in the Irish  
24     forum if Ryanair decides that it needs to add additional  
25     defendants from this dispute to the Booking.com defendant,

1 but there is no reason to believe from the record that  
2 Ryanair will not be able to get any relief it needs in the  
3 Irish court system which has taken jurisdiction over a  
4 case just like this.

5 THE COURT: I want to make sure on the consent  
6 point that this is very clear. If I were to dismiss the  
7 action here, you're representing on behalf of all five  
8 defendants named here, they will fully consent to jurisdiction  
9 in the Irish court; right?

10 MS. HARTNESS: Yes, Your Honor. What I think  
11 we've said, and we have the declaration from our Irish  
12 counsel to put this properly. But he explained the way that  
13 process would issue, to serve the foreign defendants, and  
14 we will not resist the jurisdiction of the Court if we're  
15 properly served.

16 We may make -- there could be a motion to  
17 dismiss or for other grounds, but these defendants, for this  
18 specific dispute, will not revisit the jurisdiction of the  
19 Irish court, if they're properly served.

20 THE COURT: Okay. And that is contingent on  
21 this case being dismissed; right?

22 MS. HARTNESS: Correct, yes.

23 THE COURT: Okay.

24 MS. HARTNESS: And the reason for that is simply  
25 we don't -- you know, Booking.com has been sued in Ireland.

1     Apparently, the parties have a dispute. And our view is  
2     this should be proceeding in one forum, not in two forums,  
3     particularly where ongoing litigation of the matter in two  
4     forums, were that to happen, could lead to conflicting  
5     rulings, including about the meaning of the terms of use and  
6     other issues.

7             And so, again, just like Ryanair is able to do  
8     in its ongoing dispute with Vola, we submit the right  
9     answer here is to just let it actually litigate the case it  
10    initiated in the Irish courts and where there is no evidence  
11    that, or any reason to believe on the record that it cannot  
12    do that.

13            So beyond showing adequacy of the forum, which I  
14    believe we have shown here, and it is distinguishable from  
15    the other situations where a forum is not adequate, the  
16    next step is to determine the amount of deference due to  
17    Ryanair's choice of forum.

18            And, you know, you are no doubt familiar with  
19    the Third Circuit case law, including the more recent case  
20    decision in the *Wilmot* case, that makes clear the foreign  
21    plaintiff's choice of forum is entitled to little deference,  
22    particularly whereas here the alleged computer intrusion  
23    happened abroad.

24            Now, that doesn't mean that Delaware does not  
25    have an interest in the activities of corporations

1 incorporated here, it just means there is little deference  
2 to the forum choice in this situation. There is, under  
3 the case law, a doctrine where plaintiff can then make a  
4 strong showing of convenience to bolster their otherwise  
5 low deference given to their forum. And there is no such  
6 showing made here by Ryanair. They've identified no  
7 relevant evidence, witnesses, or activities in Delaware.

8 And then that, of course, brings us to the  
9 private and public factors and figure out whether they  
10 outweigh any deference due to the plaintiff's forum choice.

11 Here, we would submit, and I won't walk through  
12 all of them, but of course I'm happy to answer any questions  
13 on the undisputed record.

14 And, again, our declarations have not been  
15 disputed here, that the public and private factors all point  
16 to Ireland.

17 For the private factors, the key question is  
18 where is the evidence? Where will it be more convenient to  
19 litigate? And this is where the record shows that there  
20 are, again, no witnesses or evidence in Delaware. The  
21 allegedly intruded computers are in Ireland. The plaintiff  
22 is in Ireland, and the key defendants and third parties are  
23 all foreign and more accessible to Ireland than to Delaware.  
24 And, of course, the main target of the dispute, Booking.com,  
25 which is the one that is, you know, allegedly making the

1 most use of Ryanair's website, is a Dutch company. It's  
2 already been sued in Ireland.

3 I would also just flag, this is maybe a minor  
4 point, but one of the American defendants, Kayak actually  
5 has, as its declaration shows, the relevant witnesses would  
6 be abroad. So it's not even like there is some nucleus of  
7 relevant witnesses here in the U.S. from the U.S. companies.  
8 Even the U.S. companies' witnesses point in international  
9 direction, generally.

10 And then just turning to the public factors.  
11 The key question there is whether it makes sense to burden  
12 the Delaware courts with this dispute when it could be heard  
13 in Ireland. And that is, of course, not a judgment whether  
14 this court is efficient or competent. It's whether there is  
15 a sufficient connection between this dispute and Delaware to  
16 keep it here as opposed to Ireland.

17 And for the reasons we have detailed in our  
18 brief and discussed today, here, Ireland is where it makes  
19 sense to have this litigation. There is no connection to  
20 Delaware other than the state of incorporation. And the  
21 Third Circuit has repeatedly affirmed forum non conveniens  
22 dismissals where the locus of the alleged conduct was  
23 foreign and the only connection is Delaware was the state of  
24 incorporation.

25 And I would point you to the *Dahl*, D-a-h-l, and



1 the *Wilmot* case in the Third Circuit as being specific to  
2 that point of the only tie being the state of incorporation.  
3 But I --

4 THE COURT: Is it fair for me to consider that  
5 I think it's three of the defendants are Delaware entities,  
6 including I guess the parent holding company. Those three  
7 entities chose to organize themselves under Delaware law,  
8 and you're clearly familiar with the many cases not just  
9 from me but from others on this court.

10 It's difficult, even when you are just trying  
11 to transfer venue, much less actually dismiss a case, to  
12 show that when you choose to organize under Delaware laws,  
13 defending your actions in a Delaware court is inconvenient  
14 to you.

15 I guess the questions are: Isn't that all a  
16 fair part of the analysis? And what have you shown that  
17 should lead me to think it really would be inconvenient to  
18 the Delaware entities, at least the Delaware defendants to  
19 litigate this case here?

20 MS. HARTNESS: No, Your Honor. We understand  
21 that and recognize, you know, the points you made in your  
22 prior rulings, and they're fair points, which is that the  
23 company is choosing to incorporate in Delaware. That's not  
24 irrelevant. That is important. And the State of Delaware  
25 does have an interest in policing its incorporated entities.

1           So I think it's not saying there is a zero  
2     interest in that. It's really when it's the only connection  
3     is the place of incorporation, that's where, you know, the  
4     Third Circuit has emphasized this in an older case, the *Dahl*  
5     case from 1990, and that is where the Third Circuit said the  
6     only contact Delaware has with this case is the defendant's  
7     state of incorporation. And they then said that the  
8     commitment of, you know, Delaware time and resources is not  
9     justified.

10           And then that much more recently in the *Wilmot*  
11     case, that was from 2017. There, again, the Third Circuit  
12     emphasized in affirming the forum non conveniens dismissal  
13     that the only connection to Delaware is that it's the place  
14     of incorporation.

15           Now, you're right, that is one point, but then  
16     the question is how inconvenient is this? And here, I think  
17     what is important, the record really does show that it's  
18     going to involve a lot of -- to really litigate this dispute  
19     in Europe is going to be far more convenient, far easier  
20     than do it here in the United States, especially when you  
21     have three foreign aggregators that are going to be a source  
22     of information, when you are going to have the remaining of  
23     the defendants is the "booking" defendant where even the  
24     American company Kayak has its witnesses that are relevant  
25     in Europe.

1           So we agree at that point we need to show the  
2     burden. And I think what we have shown and what is really  
3     undisputed from the record is that there is going to be  
4     very little, if any, evidence that is available in the  
5     United States that is relevant to this dispute. And the  
6     vast bulk of evidence will be available more easily to  
7     the Irish court, either because of the processes that are  
8     available within the European Union or because the computers  
9     themselves and the parties -- of the parties here, the  
10    plaintiff is in Ireland and it's more convenient to handle  
11    that in the jurisdiction rather than to have to bring that  
12    all into a U.S. court.

13           THE COURT: I think --

14           MS. HARTNESS: And again --

15           THE COURT: I think what the plaintiff is saying  
16    is they have sued the defendants, they've sued you. They  
17    don't buy your denial that you had anything to do with the  
18    alleged screenscraping by the third-party aggregators, and  
19    they want your evidence. It could turn out, you know, if  
20    your denials are correct, maybe you don't have any evidence;  
21    right? Maybe there really is no evidence that these  
22    defendants in front of me today in any way encouraged,  
23    authorized, I don't know, benefited from whatever the  
24    third-party aggregators did.

25           But even that absence of evidence is what the

1 plaintiff I think is saying this case is about. They want  
2 to know what is on your computers. They want to know, you  
3 know, what correspondence and interactions you had with the  
4 third-party aggregators. And that is all U.S. focused, they  
5 would say.

6 Why, at this very early stage, is that not the  
7 way I should be thinking about this forum non conveniens  
8 analysis?

9 MS. HARTNESS: Well, Your Honor, it's because of  
10 the record that we have provided. You know, I appreciate --  
11 that they may speculate that, or -- and I think speculate,  
12 it is probably less than that. Because, again, I appreciate  
13 the Vola decision that we attached to our Irish counsel's  
14 declaration is lengthy, but why it is so lengthy is it  
15 contains extensive information of a Ryanair witness trying  
16 to show how they were able to connect the dots between the  
17 defendant in that case using the website in Ireland.

18 And so I think our point is that they can't  
19 simply kind of do a bare bones complaint speculating that  
20 defendants have had some involvement or connection to the  
21 alleged access and then in the face of our evidentiary  
22 presentation, which we have tried to keep, you know, as  
23 brief as appropriate but we also in detail explain for each  
24 of our five defendants where the relevant evidence would be  
25 and what the relevant -- you know, that these other third

1 parties are actually the ones at issue, if anything.

2 And so in response to that evidentiary record,  
3 which we take our burden seriously, there has been nothing  
4 in respond to that. And we know from the Vola lengthy  
5 discussion of the evidence that Ryanair is able to marshal  
6 when it wants to in Vola, that it could have done something  
7 like that if it really had something to connect us to the  
8 dispute.

9 So, again, we're not saying we have to  
10 litigate the entire matter through the forum non conveniens  
11 evidentiary record, which is supposed to be, as the cases we  
12 cite, is less. It's not supposed to be a full blown trial,  
13 but the point is we have more than shown the European nexus  
14 and the Irish connection of this dispute, and the lack of  
15 connection to the U.S. through our declarations, and they  
16 have had nothing in response other than continuing to say  
17 that they would like to pursue it here.

18 So I think it is that record we would submit  
19 shows the burden and shows there is basically just no basis  
20 for having this case proceed here when there is already a  
21 case somewhere else where it could be mitigated much more  
22 conveniently.

23 THE COURT: All right. I want to make sure to  
24 save you sufficient time for rebuttal, but I want to ask you  
25 two more questions.

1 MS. HARTNESS: Sure.

2 THE COURT: On the stay point, it would seem a  
3 reasonable prediction that we're going to hear from the  
4 Supreme Court within no more than the next six weeks on the  
5 first of the cases, the one that was argued. It would seem  
6 to me that before I'm going to have to make a decision that,  
7 you know, you couldn't ask for relief from before this case  
8 goes very far, we're going to hear at least something from  
9 the Supreme Court. Is a stay really what I should consider  
10 doing at this point?

11 MS. HARTNESS: Your Honor, you also could just  
12 await the Supreme Court's guidance, and we could submit a  
13 supplemental brief then without a formal stay of the case.

14 I think our client's position, though, is it  
15 would be unfair to subject us to beginning discovery and  
16 just kind of undertaking this case in earnest both because  
17 of the forum non conveniens point, there is already a case  
18 where we're subject to suit on this, but more importantly,  
19 without understanding kind of what the metes and bounds are  
20 of the CFAA claim, and so I think you could properly discern  
21 that the current claim before the Court on the *Van Buren*  
22 case is the exceeds authorized access theory.

23 There is also the *LinkedIn* case waiting in the  
24 wings which is being held by the Supreme Court until it  
25 resolves the *Van Buren* case. At that point, the Court will

1 either grant *LinkedIn* or vacate it back to the Court of  
2 Appeals to apply whatever the teachings of *Van Buren* are.  
3 But regardless, you know, whatever happens in that case will  
4 help us understand what the scope of a CFAA claim is.

5 So, yes, we respectfully submit to you whatever  
6 makes more sense in order to inform yourself of that dispute  
7 will allow the parties to have that shape our initial  
8 motions without having us to have to basically litigate a  
9 case that may not need to be litigated if the Supreme Court  
10 were to, for example, as the *LinkedIn* case presents, a  
11 question of whether website terms of use can be the basis  
12 for a CFAA claim.

13 So I think we will know more after *Van Buren*  
14 issues how decisive it is with respect to the specifics of  
15 our case, but we would respectfully submit that the litigation  
16 in this case should not proceed in earnest before we have  
17 that guidance and are able to shape our initial motions  
18 accordingly.

19 THE COURT: All right. And then one more.

20 In arguing that the Irish court is an adequate  
21 forum, you also take the view that potentially there may be  
22 some way that plaintiff could put the CFAA claim in front  
23 of the Irish court? You know, I don't know if they have  
24 something like supplemental jurisdiction or something like  
25 that. Is that not part of your argument as to why the Irish

1 court is adequate?

2 MS. HARTNESS: Your Honor, that is not part of  
3 our argument as to why the Irish court is adequate. In  
4 this case, it would be the situation of having sort of an  
5 analogous or similar causes of action available within  
6 Ireland, but we don't submit that Ireland has a CFAA, per  
7 se, or that it would be able to apply the CFAA in Ireland.  
8 It would be more that the several causes of action that were  
9 set forth in the letter from Ryanair to Booking.com and then  
10 these are the causes of action being actively litigated in  
11 Ryanair's lawsuit against Vola. Those would be the claims  
12 that would essentially provide the potential of a remedy  
13 that would be similar to what they would get under the CFAA  
14 theory in the U.S.

15 THE COURT: Okay. Thank you very much. We'll  
16 save the rest of your time for rebuttal. We'll turn it over  
17 to plaintiff.

18 MS. HARTNESS: Thank you.

19 THE COURT: Thank you.

20 MS. KPOR: Good morning, Your Honor. Thank you  
21 for your time today. Lisa Kpor, K-P-as-in-Peter-O-R, on  
22 behalf of plaintiff non-movant Ryanair DAC.

23 THE COURT: Good morning.

24 MS. KPOR: Your Honor -- thank you, Your Honor.  
25 Good morning.



1           Your Honor, resolution of the defendants' motion  
2 to dismiss, in the alternative to stay, boils down to two  
3 common threads.

4           First, the fact that Delaware is a more  
5 convenient and appropriate forum for this litigation that  
6 is based on a uniquely American statute. And, second, that  
7 the defendants repeated failure to meet their high burden  
8 of proof with respect to the requisite elements of a forum  
9 non conveniens analysis is apparent here.

10          The defendants argue that Ryanair's complaint  
11 should be dismissed on the basis of forum non conveniens and  
12 extraterritoriality. They also contend this matter should  
13 be stayed in light of two cases pending before the United  
14 States Supreme Court, only one of which has been granted a  
15 writ of certiorari.

16          With respect to their primary argument, in  
17 essence, the defendants request this court to enter an order  
18 dismissing Ryanair's complaint on forum non conveniens grounds  
19 so that Ryanair can institute this litigation involving a  
20 United States statute, three Delaware corporations, and two  
21 subsidiaries of a Delaware corporation in Ireland.

22          Despite defendants' assertions to the contrary,  
23 in no way is Ireland a more convenient forum than this  
24 court. And this court forum is not so inconvenient as to  
25 cause an oppressiveness or vexation to the defendants.

1                   Accordingly, defendants' forum non conveniens  
2                   argument should be disregarded because Ireland is not an  
3                   appropriate forum for resolution of Ryanair's federal  
4                   statutory claim. Ryanair's choice of forum is entitled to  
5                   some deference, and both the public and private interest  
6                   factors all weigh in favor of the denying defendants' motion  
7                   to dismiss.

8                   The defendants' extraterritoriality argument  
9                   also fails because the plain language of the Computer Fraud  
10                  and Abuse Act, also known as the CFAA, confirms that it  
11                  applies extraterritorially. And even if it did not, the  
12                  extraterritoriality doctrine would not bar Ryanair's claim  
13                  because there are significant allegations of domestic  
14                  misconduct orchestrated by primarily domestic corporations  
15                  that resulted in domestic harm.

16                  Finally, defendants' motion for stay is subject  
17                  to denial because staying this case pending a resolution of  
18                  the *Van Buren* and *LinkedIn* cases would not simplify the  
19                  issues for trial and would result in undue prejudice to  
20                  Ryanair. All things considered, the defendants' motion  
21                  should be denied in its entirety.

22                  Point one. The defendants' forum non conveniens  
23                  argument is without merit.

24                  THE COURT: All right. Ms. Kpor, I'm going ask  
25                  to ask you to start with the CFAA and the extraterritoriality

1 arguments. Could you go to that part of the presentation  
2 first, please?

3 MS. KPOR: Absolutely, Your Honor.

4 THE COURT: Thank you.

5 MS. KPOR: Your Honor, this Court should reject  
6 defendants' argument that Ryanair's complaint is subject to  
7 dismissal because it impermissibly seeks extraterritorial  
8 applications of law.

9 Courts apply a two-step framework for deciding  
10 questions of extraterritoriality. Courts begin by analyzing  
11 whether a clear affirmative indication rebuts the  
12 presumption against extraterritoriality.

13 If nothing rebuts that presumption, courts then  
14 determine whether the case involves domestic application of  
15 the statute.

16 In this case, defendants extraterritoriality  
17 argument also fails under each step of this framework.

18 First, it is abundantly clear that the CFAA's  
19 private right of action applies extraterritorially.

20 Second, even if the CFAA did not apply beyond  
21 the United States, the complaint alleges domestic conduct  
22 and domestic harm, thereby placing it outside of the scope  
23 of the extraterritoriality doctrine.

24 Regarding the first point, for more than  
25 20 years, every federal court that has opined on whether

1 the CFAA provides a clear indication of extraterritorial  
2 application has answered affirmatively.

3 Just three years ago, in *Ryanair vs. Expedia*,  
4 Expedia made the very same arguments that the defendants  
5 have set forth here. And the U.S. District Court for the  
6 Western District of Washington determined that "the CFAA's  
7 text gives a clear affirmative indication that its civil  
8 provision applies extraterritorially."

9 Defendants cannot dispute the existence of these  
10 rulings that cut directly against their argument. So instead  
11 of addressing them, defendants distinguish those cases by  
12 saying all of the conduct here occurred abroad while each of  
13 those cases "simply allowed non-U.S. plaintiffs to invoke  
14 the CFAA against a United States defendant whose domestic  
15 actions allegedly violated the CFAA."

16 But Ryanair has relatedly argued and the  
17 allegations of the complaint state that a substantial  
18 amount of alleged computer access in this case did in fact  
19 occur domestically in Delaware, Connecticut, or both.

20 As a result, just as in the cases where the  
21 courts held that the CFAA applies extraterritorially, the  
22 present matter is also a case where a non-U.S. plaintiff  
23 was permitted to invoke the CFAA against the U.S. defendants  
24 and related subsidiaries who allegedly violated the CFAA.

25 And there can be no question that the CFAA

1 applied extraterritorially because, among other things, the  
2 CFAA literally defines a protected computer as a computer  
3 which, if used in or affecting interstate or foreign  
4 commerce or communication, including a computer located  
5 outside of the United States, that is used in a manner that  
6 affects interstate or foreign commerce.

7 Defendants attempt to radicalize Ryanair's  
8 position by contending that Ryanair believes "the CFAA  
9 covers every computer intrusion in the world regardless  
10 of the connection to the United States."

11 This could not be farther from reality.

12 As noted in the Western District of Washington's  
13 opinion, any CFAA lawsuit would require personal jurisdiction  
14 over the defendant which obviates the possibility of resolving  
15 claims between two foreign parties over a foreign computer  
16 that happens to affect American commerce.

17 All things considered, because the CFAA  
18 demonstrates with clarity that a statute applies  
19 extraterritorially, defendants extraterritoriality argument  
20 can be rejected on that basis alone.

21 THE COURT: Yes. Let me ask you some questions  
22 about that.

23 In pointing to the personal jurisdiction  
24 requirement, that seems like you are conceding that your  
25 interpretation of the CFAA itself is one that could

1       contemplate, could reach, could treat as a violation of it,  
2       a suit between two foreign parties potentially about access  
3       to any computer anywhere in the world. Is that right?

4               MS. KPOR: Your Honor, that statement is made  
5       simply to ensure the Court that we are not attempting to say  
6       the CFAA applies to every single situation where a computer  
7       is intruded by another party regardless of whether those  
8       parties are foreign.

9               So I don't think that I agree with the position  
10      you have articulated. There has to be some hook in order  
11      for the CFAA to apply to corporations or to a suit in the  
12      United States.

13              THE COURT: Well, focus me on that, if you  
14      would. What is it that you see in the CFAA that prevents  
15      it from applying to any computer anywhere in the world. I  
16      understand the personal jurisdiction argument. I'm not  
17      saying I necessarily reject it, but is there something in  
18      the statute itself that also is responsive to defendants'  
19      concerns about the breadth of the statutory interpretation  
20      you're pressing on the Court?

21              MS. KPOR: Your Honor, I would argue that the  
22      CFAA and the United States -- and additional United States  
23      statutes as well ensure that causes of action brought before  
24      this Court fall within the purview of the Court's subject  
25      matter jurisdiction and as well as the personal jurisdiction

1 requirement that are required with respect to defendants  
2 generally.

3 So there is no possibility that the CFAA would  
4 apply when in collective use with other statutes to only  
5 foreign entities and foreign access with no ties to the  
6 United States whatsoever.

7 And, Your Honor, I would also add --

8 THE COURT: Go ahead. Sorry.

9 MS. KPOR: Your Honor, I would also add that  
10 even if the CFAA did not apply extraterritorially, Ryanair's  
11 complaint would still not be subject to dismissal because  
12 the complaint alleges domestic conduct and domestic injury.  
13 In other words, Ryanair satisfies the second step of the  
14 two-step framework as well.

15 And in the same opinion, where the United  
16 States District Court for the District of Washington opined  
17 that the CFAA applied extraterritorially, the court also  
18 mentioned that the defendants' extraterritoriality argument  
19 was not persuasive because the case involved a permissible  
20 domestic application of the CFAA given that Ryanair alleged  
21 in that case that the defendants' unauthorized access  
22 originated in the United States, and that it harmed, among  
23 other things, Ryanair's reputation and goodwill with  
24 American customers.

25 The same can be said for this case. Most of the

1 defendants are incorporated in Delaware and have principal  
2 places of business in Connecticut. It follows then that as  
3 alleged in the complaint, a substantial part of the actions  
4 giving rise to the CFAA violations occurred domestically in  
5 Delaware or Connecticut or both and that some unlawful  
6 computer access occurs here in the United States by the  
7 Delaware defendants.

8 For example, in the declaration submitted by the  
9 defendants of Marcos Guerrero. Mr. Guerrero states that  
10 since Booking.com launched its flights product in September  
11 2019 and through December 2020, fewer than 100 Ryanair  
12 tickets have been sold via Booking.com to customers with a  
13 U.S. IP address: 24 through Etraveli and 71 through  
14 Priceline.

15 Not only has Priceline sold 2,000 Ryanair tickets  
16 since 2019, Priceline sold at least 71 of those ticket to U.S.  
17 customers. Priceline is one of the defendants here that is  
18 incorporated in Delaware and maintains a principal place of  
19 business in Connecticut. In making this declaration, Mr.  
20 Guerrero essentially concedes that Priceline scraped Ryanair's  
21 website without authorization from the United States and sold  
22 71 Ryanair tickets to U.S. customers which negatively impacts  
23 Ryanair's goodwill among U.S. customers.

24 They --

25 THE COURT: How -- I'm sorry. How is that a



1 concession of scraping by Priceline?

2 MS. KPOR: Your Honor, the only way that that  
3 information could have gone on to the Priceline website is  
4 if Priceline itself, or someone acting at the direction of  
5 Priceline, placed Ryanair flight information on the  
6 Priceline website. So, in essence, they are conceding that  
7 this conduct is taking place. The conduct that is --

8 THE COURT: Yes. What if you can't prove they  
9 had any knowledge that that third party was scraping or that  
10 they were doing it as defendants' direction or request?

11 MS. KPOR: Yes, Your Honor. Well, to that  
12 point, we have already placed into the -- as an attachment  
13 to the complaint, several exhibits that demonstrate that the  
14 defendants did have knowledge that they were not permitted  
15 to scrape information from Ryanair's website. And so --

16 THE COURT: Did you point to anything yet that  
17 they had knowledge that the third parties were scraping and  
18 that that was the only way the defendants were able to get  
19 the Ryanair information?

20 MS. KPOR: Your Honor, that is something that  
21 would likely come out in discovery. At this time, we do not  
22 know, and the Court doesn't know, whether it was the  
23 defendants themselves who scraped the Ryanair website or  
24 third parties. And the defendants have attempted to  
25 shift blame and say that the third parties scraped that

1 information from the Ryanair website.

2 But to the extent that they are saying that  
3 they have no authority or control over their website or no  
4 knowledge what is on their website is a far stretch, Your  
5 Honor, and I believe that they -- because that information  
6 is on the Priceline website, and they did have the ability  
7 to sell Ryanair tickets, this Court can assume that  
8 Priceline knew or actually directed someone within their  
9 organization or a third party to place that information on  
10 their Priceline website, and the location of all of that  
11 activity is domestic.

12 Accordingly, in light of the fact that a  
13 substantial amount of the relevant conduct occurred in the  
14 United States, defendants' extraterritoriality argument must  
15 fail, and their motion to dismiss should be denied.

16 THE COURT: All right. Yes. Let me ask you  
17 some more about that.

18 I recognize it's a motion to dismiss, but the  
19 defendants have put a lot of evidence in the record and  
20 among other things, they point me to this case in Ireland,  
21 and they say it shows, in addition to common sense, that  
22 Ryanair knows to a certainty or could figure out to a  
23 certainty who has been scraping, if anyone has, the Ryanair  
24 website. And they say you know that the defendants haven't  
25 done that.

1                   What is your response to that?

2                   MS. KPOR: Your Honor, our response to that is,  
3 no, we don't know at this time. Based upon our information  
4 and belief, we have reason to believe that the defendants  
5 themselves have engaged in screenscraping.

6                   In addition, I would also add that with respect  
7 to the Irish action, the fact that we've made certain  
8 allegations in that case does not establish necessarily  
9 that those causes of action would be actually addressed  
10 by an Irish court. And I know that goes to the forum non  
11 conveniens argument, but I want to make that point clear  
12 here.

13                   And in addition, with respect to  
14 extraterritoriality, this is, again, a motion to dismiss,  
15 and a 12(b)(6) motion. It is -- at this time, the  
16 allegations of the complaint make it clear, and we have  
17 argued, that there is domestic conduct, domestic harm  
18 orchestrated by primarily domestic parties.

19                   THE COURT: Can you point me to where in the  
20 complaint you allege that the defendants have done the  
21 screenscraping themselves?

22                   MS. KPOR: Yes, Your Honor. So, for example,  
23 and as noted by opposing counsel, in paragraph 25 of the  
24 complaint, we say, on information and belief, the defendants  
25 have also committed one or more of the acts alleged in this

1 complaint within the state and district.

2 Your Honor, we also note in additional locations  
3 of the complaint that the conduct alleged here occurred  
4 within this district.

5 THE COURT: So I think they also point to  
6 paragraph 74, but their contention is, this is at best  
7 information and belief. This is conclusory. And again,  
8 you have control over your own computers. We know from the  
9 other case you can analyze your own computers. Why should I  
10 find this to be an adequate allegation of domestic conduct  
11 by the defendant?

12 MS. KPOR: Your Honor, this Court is a court  
13 that follows the procedures of notice. We have placed the  
14 defendants on notice of what we believe has transpired here,  
15 and we are entitled to uncover discoverable information that  
16 will go toward the allegations of complaint.

17 If, for instance, the defendants want to set  
18 forth that they have not engaged in any activity that would  
19 in some way be relevant to the CFAA, then they can do so,  
20 but they are required to do so, and they are required and  
21 will be compelled to produce witnesses under Rule, Federal  
22 Rule of Civil Procedure 30(b)(6) to establish whether or not  
23 they have engaged in this conduct.

24 And even if they are not doing it, we can allege  
25 that they are commanding agents to do this.

1                   So, Your Honor, I hope that that answers your  
2 question. Are there any additional questions that I might  
3 be able to address?

4                   THE COURT: Yes. Thank you.

5                   So if I were to find your allegations of  
6 domestic activity inadequate at this point, you have asked  
7 for leave to amend. Are you able to represent that your  
8 client would be able to allow you to amend in a way that  
9 would more fulsomely allege how it is you know that the  
10 defendants have -- I think you are alleging both, at least  
11 you are arguing you have alleged both -- both that the  
12 defendants actually are screenscraping Ryanair's website and  
13 that they're directing and controlling third parties to do  
14 so.

15                  If I think you haven't adequately alleged that  
16 and give you leave to amend, can you do better and give us  
17 more to possibly make that into a plausible allegation?

18                  MS. KPOR: Yes, Your Honor. And we can make  
19 additional allegations of fact regarding whether the  
20 third-party aggregators themselves conducted in this and  
21 whether the defendants themselves have engaged in this  
22 activity.

23                  But I would add, Your Honor, the declarations  
24 submitted by the defendants themselves establish that they  
25 have engaged in misconduct, that they are placing Ryanair

1 information on their website, selling tickets to Ryanair's  
2 customers, and that is sufficient for this court to  
3 determine that domestic conduct is being engaged in by the  
4 defendants in violation of the CFAA.

5 THE COURT: All right. Going back to I suppose  
6 the first step of the analysis, the extraterritoriality  
7 breach of the statute. Is it your view that Ryanair could  
8 sue only Booking.com, which is a Dutch company, in this  
9 court for a CFAA violation?

10 MS. KPOR: No, Your Honor. That is not our  
11 position. Our position is that this Court can find all five  
12 defendants have violated the CFAA.

13 THE COURT: Right. I recognize that. I did not  
14 articulate that question well. If you wanted only to bring  
15 suit against Booking.com, that is only a foreign entity,  
16 could I hear that case, you know, between just Ryanair and  
17 Booking.com? Could I hear a case for an alleged violation  
18 by those two foreign actors for violation of U.S. law?

19 MS. KPOR: Yes, Your Honor. I believe that the  
20 circumstances here would allow the Court to make a ruling  
21 with respect to Booking.com's violation of the CFAA. In  
22 that circumstance, you have a party that is conducting  
23 business in the United States within this district, and that  
24 the court would have personal jurisdiction over Booking.com  
25 in that instance. And you also have the ability to address

1       that matter given their extraterritorial application of the  
2       CFAA and what is submitted and defined as a protected  
3       computer under the circumstances.

4               THE COURT:   Would you then agree you'd have to  
5       allege that Booking.com did something in the U.S.?

6               MS. KPOR:   Yes, Your Honor.   So that goes to  
7       multiple points actually.   Your Honor, first, the alleged  
8       computer access could have occurred in the United States.  
9       It could have also had domestic harm, domestic injury to  
10      U.S. customers, to the goodwill that Ryanair has established  
11      to U.S. customers.

12              Ryanair's domestic injury could also extend to  
13      the inability to obtain a greater amount of revenue given  
14      that Booking.com would be targeting the United States  
15      customers and inflating prices of Ryanair flights.

16              And the imposition of additional fees on private  
17      Ryanair flights could be an additional U.S. harm, a U.S.  
18      related harm.

19              THE COURT:   You talk about in your brief about  
20      a, I think you call them a conduct test and an effects test.

21              The defendant says those have both been rejected  
22      by the Supreme Court.   What is your response to that?

23              MS. HARTNETT:   Your Honor, we do not believe  
24      that both of those tests have been rejected by the Supreme  
25      Court expressly.   We believe that the effects test, the

1 effects test and conduct test, under either test Ryanair  
2 has satisfied all of the requisite elements in those tests  
3 and, in addition, were there under some circumstances the  
4 court, the Supreme Court did reject either test, then we  
5 have already established, first, that the CFAA provides a  
6 clear indication of extraterritorial application.

7 And multiple federal courts have already decided  
8 that. For instance, in *United States vs. Ivanov*, which was  
9 handed out in the District Court of Connecticut, there, the  
10 court states Congress has clearly manifested its intent to  
11 apply the CFAA to computers needed for either interstate or  
12 foreign commerce.

13 So regardless of whether the United States  
14 Supreme Court has rejected either test, it's clear this  
15 Court does not have to address either test because the CFAA  
16 applies extraterritorially.

17 THE COURT: I think we were talking about  
18 paragraph 25 before. You have a paragraph, I think it's 27.  
19 I don't have the complaint in front of me right at this  
20 moment, but I think you allege on information and belief a  
21 substantial part of the actions giving rise to the claim  
22 occurred in this district.

23 What is the basis for that information and  
24 belief in that allegation?

25 MS. KPOR: Your Honor, as we have indicated,



1 three of the defendants are incorporated in Delaware. And  
2 so to the extent that any of those Delaware organizations  
3 were conducting business in Delaware that violated the CFAA,  
4 such actions would give rise to the claim. Here, it has  
5 been advanced in the complaint.

6 In addition, the defendants also have principal  
7 places of business in Connecticut. And because they have  
8 businesses in Connecticut and they are incorporated in  
9 Delaware, it is clear that some of the relevant conduct has  
10 occurred in Delaware and/or Connecticut, and that establishes  
11 that this court is more convenient of a location to advance  
12 this litigation than an Irish court.

13 And, Your Honor, if we may turn to the forum non  
14 conveniens argument.

15 We want to establish that not a single factor  
16 under the forum non conveniens analysis has been satisfied  
17 by the defendants, and that the defendants cannot meet their  
18 heavy burden of opposing Ryanair's selected forum choice.

19 Your Honor --

20 THE COURT: Yes, you can certainly turn to that.  
21 Let me ask you, though, another question as you do.

22 In your answering brief at page 10, you say  
23 relevant evidence will likely be found in Delaware. What is  
24 the basis for that?

25 MS. KPOR: Your Honor, again the basis is that

1       they are incorporated in Delaware. And they are likely  
2       doing business in Delaware and Connecticut as Delaware  
3       entities, three entities that are incorporated in Delaware.

4               THE COURT: Does it follow as a factual or legal  
5       matter that if you are incorporated here, you conduct  
6       business here, you take actions here, and you maintain  
7       evidence here?

8               MS. KPOR: Your Honor, I don't think that that  
9       is necessarily the case in all circumstances. However, here  
10      we believe that the evidence will show that some of the  
11      relevant access and additional activity that is relevant to  
12      the complaint took place in Delaware.

13              THE COURT: Can you give me any even single  
14      basis for why you say that? I recognize you have that  
15      belief, but why shouldn't I just deny that or, you know,  
16      reject it as complete speculation?

17              MS. KPOR: Your Honor, for instance, there have  
18      been, there have been declarations submitted by opposing  
19      counsel, Your Honor. And, for instance, in one of those  
20      declarations by Mr. Christopher Winter, the Vice President  
21      of Air Revenue Development for Defendant Priceline, he  
22      points out that Priceline has sold 2,000 Ryanair tickets  
23      through its websites in 2019. He is situated in Norwalk,  
24      Connecticut and likely operates out of Priceline's office.  
25      However, given that that corporation is incorporated in

1 Delaware, it is likely that some of their relevant conduct  
2 has actually occurred in Delaware.

3 THE COURT: Should I consider transferring this  
4 case to Connecticut? It sounds like you are more likely to  
5 find evidence and activity and business conducted by  
6 defendants in Connecticut.

7 MS. KPOR: Your Honor, I don't think that motion  
8 is before the Court at this time, and I don't think that  
9 that would be an appropriate step for this Court to take  
10 under the circumstances given this Court has personal  
11 jurisdiction over three of the defendants here and that the  
12 other two defendants are subsidiaries of Booking Holdings  
13 which is a corporation that is incorporated in Delaware.

14 In addition, Your Honor, I think that it is  
15 very important for this Court to look at the defendants'  
16 motion as a whole. They have brought a motion to dismiss  
17 this action on forum non conveniens grounds, and they have  
18 not met any of the elements of a forum non conveniens  
19 analysis.

20 Those four elements include, first, the  
21 existence of adequacy of an alternative forum; the amount of  
22 deference accorded to the plaintiff's choice of forum; the  
23 convenience of the parties and the private interest factors;  
24 and the interest of the forum which is known as the public  
25 interest factors.

1           And for the first factor, Ireland is not an  
2           adequate alternative forum for resolution of Ryanair's  
3           CFAA claim. And to qualify as an alternative adequate  
4           forum, there are two requirements: one, the alternative  
5           jurisdiction must offer reasonable remedies and, two, the  
6           defendant must be amenable to process within that other  
7           forum.

8           The defendants have not proven either element,  
9           and it is their burden to do so.

10          With regard to point one in Ryanair's response,  
11          we noted that defendants have never identified a single  
12          cause of action under Irish law that would provide  
13          reasonable redress for Ryanair's injuries. It would have  
14          been logical for the defendants to reply to this argument by  
15          specifically identifying Irish claims that are analogous to  
16          the CFAA claim particularly given the defendant bears the  
17          burden of establishing Irish law provides some remedy but  
18          they did not.

19          THE COURT: Of course, they point, they point to  
20          your lawsuit. Why is that not enough to meet their burden?  
21          You all decided to at least the one entity in Ireland.  
22          Doesn't it follow from that, that you thought you had a  
23          cause of action and an adequate remedy there?

24          MS. KPOR: Yes, Your Honor. But the Irish High  
25          Court in Vola simply declared that it sought to make --

1 that, first of all, there has been no finding in the Irish  
2 High Court that those cases will actually be viable or that  
3 the claims that were advanced in that case will be viable.  
4 And, secondly, the ruling that the Court did make in Ryanair  
5 vs. SC Vola simply declared that it sought only to make such  
6 limited findings of fact as necessary to determine the issue  
7 related to jurisdiction and not to enter upon substantive  
8 matter in that case. In other words, the Irish High Court  
9 did not hold that a claim for screenscraping would be  
10 viable under Irish law. It only addressed the matter of  
11 jurisdiction.

12 And today, for the first time, from what we  
13 believe, defendants' counsel attempted to direct this Court  
14 to the arguments advanced in one of Ryanair's letters that  
15 is attached to the complaint. However, that is not  
16 sufficient to shoulder their burden. This is a CFAA case.  
17 And the defendants have not pointed to any cause of action  
18 that would award a reasonable remedy to Ryanair under  
19 Irish law. And without establishing that Ireland offers  
20 reasonable remedies analogous to the CFAA claim raised here,  
21 they cannot set aside the first element of a forum non  
22 conveniens analysis. And given that it is defendants'  
23 burden to meet this element, their motion to dismiss is  
24 subject to denial on this basis alone.

25 THE COURT: All right. But what about your case

1       against one, I think it's one of the "booking" defendants?  
2       You, Ryanair, you have sued one of these defendants in  
3       Ireland. Doesn't it follow from that that Ryanair believes  
4       it has a cause of action, an adequate forum and an adequate  
5       remedy for the screenscraping in Ireland?

6               MS. KPOR: Your Honor, regardless of what  
7       Ryanair believes, it is defendants' burden to establish  
8       with their causes of action under Irish law that are  
9       analogous to the CFAA, and they have failed to do so.  
10      According to --

11             THE COURT: I don't, I don't -- I'm not  
12      following that. Don't they meet their burden by pointing to  
13      a complaint that you filed against them in that other forum?

14             MS. KPOR: No, Your Honor. Filing -- the  
15      filing of a complaint does not establish that Irish law  
16      would permit any defendant to successfully argue under any  
17      particular law that a claim such as the one raised here  
18      would provide reasonable redress to Ryanair or any of the  
19      defendants. That simply has not been held or decided by the  
20      Irish courts.

21             THE COURT: Well, perhaps one reason that hasn't  
22      happened is at least they tell me that you all have not  
23      moved your case against them and it's been pending a  
24      year-and-a-half. What can you tell us about why that case  
25      is not moving? And doesn't that undermine your argument

1       that a stay of the case here in front of me would unfairly  
2       prejudice you?

3               MS. KPOR: Your Honor, the progress of the  
4       Ryanair Irish litigation bears no relevance whatsoever to  
5       the resolution of defendants' motion.

6               The parties in the Irish litigation are almost  
7       entirely different. As you've noted, only one of the  
8       defendants here is a party to the Irish suite and the causes  
9       of action in the Irish litigation are different.

10              Furthermore, to directly address defendants'  
11       argument on this point would lead to the disclosure of  
12       privileged information which we will not divulge here. And  
13       what matters in this case is that there are three Delaware  
14       defendants and two defendants that are subsidiaries of a  
15       Delaware corporation that are begging this Court to dismiss  
16       this case because litigating in Ireland would be more  
17       convenient for them. That particular argument is disingenuous.

18              And with respect to the second point, Your  
19       Honor, and this is very important, defendants have also  
20       failed to establish they are amenable to process in Ireland.

21              In their reply brief, the defendants claim that  
22       they are amenable to process in Ireland and to date, in  
23       response to your question, defendants' counsel stated that  
24       all five defendants will fully consent to the jurisdiction  
25       of the Irish courts.

1                   However, this statement is in direct  
2                   contravention of the evidence submitted before the court by  
3                   the defendants. In their reply brief, defendants stated  
4                   there "amenability to process in Ireland is limited to the  
5                   specific allegations presented by Ryanair in this matter and  
6                   is not, nor should be, construed as an acknowledgment of a  
7                   broader amenability to process in Ireland."

8                   Defendants also adds the caveat that they  
9                   reserve all right to argue in any Irish action by Ryanair  
10                  concerning the specific allegations presented in this matter  
11                  that not withstanding personal jurisdiction, this matter  
12                  should be dismissed.

13                  And the defendants' supplemental declaration of  
14                  Mr. Kelly that was included with their reply demonstrates  
15                  that Ryanair would need to seek leave of court to serve  
16                  the defendants in this action that are located outside the  
17                  European Union.

18                  Mr. Kelly's personal opinion that such an  
19                  application would be readily granted by the Irish courts  
20                  is insufficient to establish that all five defendants are  
21                  actually amenable to process in Ireland.

22                  Simply put, the defendants cannot have their  
23                  cake and eat it, too. Either they are amenable to process  
24                  in Ireland or they are not. And it is clear that  
25                  defendants' statement that they are amenable to process is



1       conclusory and forced in an effort to meet the elements of a  
2       forum non conveniens analysis, not because they are amenable  
3       to process.

4               THE COURT: Let me stop you there. I tried to  
5       get as clear a statement from defense counsel as I could  
6       get that they consent, all five defendants consent to you  
7       pressing your case against them in Ireland.

8               Did you see some ambiguity in what they were  
9       saying today?

10              MS. KPOR: Your Honor, we did not see any  
11       ambiguity with respect to the answer that they provided to  
12       the Court today. However, it is in conflict with what they  
13       have submitted and what evidence that is before this Court  
14       in papers written and submitted by the actual parties  
15       themselves. And representations of counsel, that is not  
16       evidence, Your Honor. So to the extent that all five --

17              THE COURT: All right. We're starting, we're  
18       starting to get low on time, and I have a number of more  
19       questions for you. I'm sorry to interrupt, but ...

20              They point to the possibility of incongruous  
21       results, and that I should be concerned about that. I  
22       recognize you are not going to tell us anything about why  
23       the case in Ireland isn't moving forward, but as long as  
24       it's on the Irish court's docket, if I don't grant the  
25       defendants' motion here, shouldn't I be concerned that that

1 case is going to end up with a different result than the  
2 case here?

3 MS. KPOR: Absolutely not, Your Honor. There  
4 is no CFAA claim that will go before the Irish court.

5 THE COURT: Well, aren't you challenging, aren't  
6 you alleging that the defendant there engaged in the  
7 screenscraping, and that is improper under Irish law?  
8 Doesn't that completely overlap with part at least of what  
9 you are alleging here?

10 MS. KPOR: Your Honor, while some of the facts  
11 may be the same, this is a completely separate cause of  
12 action related to a federal statute that does not exist  
13 under Irish law. So there is no circumstance under which  
14 the Court would make a ruling with respect to the CFAA that  
15 would impact or somehow be incongruous with the ruling that  
16 is set forth in Ireland, to the extent that the Court in  
17 Ireland addresses the issue substantively at all.

18 THE COURT: What if that Court makes a  
19 factual finding that the defendant there did not commit the  
20 screenscraping? Am I to follow that factual finding or  
21 would you want me to have a chance to reach a conflicting  
22 factual finding?

23 MS. KPOR: Your Honor, I don't believe that  
24 there would be any conflict whatsoever.

25 So if you actually look at the causes of action

1 that have been raised here, there are multiple sections of  
2 the CFAA that are relevant. And so there would be no impact  
3 with respect to the Irish litigation and this case. There  
4 would be no overlap.

5 For instance, under Section 1030(a)(5)(A),  
6 anyone who knowingly causes transmission of a program,  
7 information or code that causes damage to a protected  
8 computer without authorization may be subject to a civil  
9 lawsuit. And that is one of the causes of action that we  
10 have provided here.

11 THE COURT: All right.

12 MS. KPOR: Regardless whether there is any  
13 ruling, any Irish court regarding screenscraping, that is  
14 not going to affect this Court's resolution of whether the  
15 defendants in this case knowingly transmitted information  
16 from the Ryanair website to their own website without  
17 authorization. It's completely different, different causes  
18 of action, and this particular cause of action that has  
19 been raised in the complaint is not analogous to the causes  
20 of action that are present in the Irish litigation.

21 THE COURT: You are agreeing, I think but I want  
22 to make sure, that as the case proceeds here, you will bring  
23 all of your witnesses here for trial and make them available  
24 in the United States for deposition if the defendants want  
25 that; is that right?

1 MS. KPOR: The Ryanair parties or the Ryanair  
2 witnesses, Your Honor?

3 THE COURT: Yes.

4 MS. KPOR: That's correct.

5 THE COURT: Now, do I need to consider the cost  
6 and logistics of getting witnesses to the United States,  
7 not just whether you're going to bring yours here and  
8 whether I could compel others? That is, I want to focus on  
9 the cost and the logistics. The cases sometimes say that  
10 is relevant. Do you agree that is relevant? And, if so,  
11 doesn't that help the defendants here?

12 MS. KPOR: Yes, Your Honor. Well, the cost of  
13 procuring witness attendance is one of the factors of the  
14 forum non conveniens analysis. And we believe that this  
15 particular factor weighs against dismissing the lawsuit as  
16 well.

17 The defendants argue that the cost of witness  
18 attendance favors dismissal because defendants have no  
19 witnesses in the United States that is relevant evidence.

20 But in our view, there are relevant witnesses  
21 here in the United States with relevant evidence. Most of  
22 them are the Delaware corporations themselves who are  
23 operating in Delaware and Connecticut.

24 In addition, Your Honor, I believe that for  
25 purposes of the forum non conveniens analysis, it would be

1 illogical for the defendants to suggest that it would be  
2 more convenient and cost effective to hail three Delaware  
3 entities into an Irish court.

4 Plus, this court has already declared in *Joao*  
5 *Control vs. Ford Motor Company* that a Delaware corporation  
6 must expect an uphill battle in proving that it is in any  
7 meaningful sense inconvenient to defendants' actions in the  
8 forum in which the corporation has freely chosen to create  
9 itself. So with respect to cost --

10 THE COURT: All right. All right. Let's -- all  
11 right. I need to interrupt you. We're starting to get very  
12 short on time here.

13 The defendants say and they put all these  
14 declarations in the record and I don't believe you have  
15 countered any of them. They say that the witnesses for the  
16 U.S. defendants who have relevant knowledge are all located  
17 outside of the United States. Do I have any basis not to  
18 believe that for purposes of the forum non conveniens  
19 analysis?

20 MS. KPOR: Yes, Your Honor. You do have reason  
21 not to believe that. And one of the declarations is the one  
22 I mentioned before, the declaration from Mr. Christopher  
23 Winter who works out of Priceline's office in Norwalk,  
24 Connecticut. If the defendant are going to attempt to argue  
25 that they haven't engaged in the conduct of which is alleged

1 in the complaint, he would potentially would be one of the  
2 witnesses that would be required to testify under Rule  
3 30(b)(6) to establish whether or not Priceline obtained the  
4 information that they placed on the Priceline website from  
5 Ryanair's website. He would have to testify to how that  
6 information was somehow placed on the Priceline website and  
7 who conducted the alleged screenscraping.

8 THE COURT: All right. Going back to the CFAA,  
9 this dispute as to whether or not the violation of the  
10 terms of use is central to or at least relevant to your  
11 allegations.

12 You say I could just strike all of the  
13 references to the terms of use and you would still have a  
14 CFAA violation alleged. Is that based on the letters? And,  
15 if so, what is your response to the point that the letters  
16 are based on the terms of use?

17 I want to understand your position on all that,  
18 please. Go ahead.

19 MS. KPOR: Yes, Your Honor. As this Court has  
20 noted earlier, Ryanair could amend its complaint, remove all  
21 references to the terms of use, and the cease-and-desist  
22 letters alone could serve as an independent basis for  
23 Ryanair's CFAA claims.

24 The defendants say that Ryanair is wrong on this  
25 point. However, a federal court that has already addressed

1       this very issue in a similar action found that Ryanair's  
2       terms of use or reference to the terms of use simply  
3       "defines the limits of authorization to access to websites."  
4       And that Ryanair's cease-and-desist letters served as an  
5       independent basis for clarifying that the scraping was  
6       unauthorized.

7               The terms of use themselves are not the sole  
8       source of establishing that the defendants have known about  
9       scraping Ryanair's website. For instance, U.S. counsel for  
10      Ryanair said Booking Holdings -- sent a letter to Booking  
11      Holdings' Connecticut office stating that Ryanair does  
12      not permit screenscraping of its website content and/or  
13      underlined data basis. So under no circumstances is Irish  
14      law going to apply to the adjudication of Ryanair's CFAA  
15      claims, and it is easier and less expensive for this Court,  
16      which is situated in the United States, to resolve a claim  
17      based on a United States statute.

18             THE COURT: Is that the Western District of  
19      Washington case that you are saying reached that conclusion  
20      or if not, what is it, please?

21             MS. KPOR: Yes, Your Honor. It is the *Ryanair*  
22      *vs. Expedia* case out of the Western District of Washington.

23             THE COURT: Okay. Thank you. Your time is up.  
24      You have answered all of my questions. Thank you. Thank  
25      you very much.

1 I'm going to turn it back to defendants for  
2 rebuttal. Ms. Hartnett, go right ahead.

3 MS. HARTNETT: Thank you so much, Your Honor.  
4 I'll try to have brief. I know we just covered a lot of  
5 points.

6 I just have two minor points of just  
7 clarification before getting to some of the bigger picture  
8 points. One is just that from our position is that there  
9 is not going -- is not that there won't be any U.S. witness.  
10 I just wanted to be clear. We didn't have in that our  
11 submission. But that other than the 30(b)(6) type witness  
12 for each of the U.S. entities, there is, you know, no real  
13 relevant witness for the holding company because it's a  
14 holding company, and then the Kayak witnesses would be  
15 abroad, and then there maybe a Priceline witness here, it's  
16 possible.

17 So I just wanted to be clear, not to overstate.  
18 And I don't think I -- if I did, I apologize, but the point  
19 is that the vast majority of witnesses would be abroad, and  
20 that creates the inconvenience.

21 I also just wanted to address the amenability of  
22 process point. And I was a little bit surprised at some  
23 of the comments because I didn't today need to deviate or  
24 create any daylight from what we said in our brief, but to  
25 reaffirm what we said in our brief, which is that, as I



1       said, the five defendants are amenable to process. They're  
2       not going to refrain, you know, they're not going to resist  
3       the jurisdiction of the Irish court, if they're properly  
4       served with respect to this dispute alone. We are not just  
5       talking sort of a general license.

6               And so I just hopefully that is clear to the  
7       Court. But I didn't mean any ambiguity or something sneaky  
8       here. This is simply a point that we believe the dispute  
9       should be in one place and that place is in Ireland.

10              You know, on the point of just the CFAA  
11       extraterritoriality point and the sufficiency of the  
12       pleading. I think going back to *Morrison* really will -- I'm  
13       sure the Court has looked at this and it does clarify. With  
14       respect to the conduct and effects test, for example, the  
15       Court made clear in *Morrison* that those criticisms they said  
16       were justified, that they're not going to guess in every  
17       case whether there is a presumption or not. So basically  
18       in deciding to apply a presumption against extraterritorial  
19       application in all cases, *Morrison* made clear that the  
20       conduct and effects test are of no moment.

21              So then the question really is whether -- I hope  
22       this is clarifying for the Court -- is the plaintiff's  
23       pleading to do something sufficient to rebut the presumption  
24       against extraterritorial application? Is there a theory of  
25       the case there that is enough to rebut that?

1           And we would grant and read, you know, parts  
2           of this in our brief as well, there is a definition of  
3           protected computer in the CFAA that can apply to a foreign  
4           computer in certain situations. The question here, though,  
5           is has there actually been a specific allegation made in  
6           the complaint of any access of this computer from a  
7           domestic location, something that would be a permissible  
8           extraterritorial application as opposed to a fully foreign  
9           application which is not permitted?

10           That would be beyond the scope of what Congress  
11           contemplated in the CFAA. And that follows from the  
12           language in *Morrison*, also in *Microsoft* where the Supreme  
13           Court has been completely clear that even if a statute  
14           allows for some extraterritorial application, you have to  
15           read that, limit that to its terms and figure out, basically  
16           not allow that extraterritorial application to be any  
17           broader than appropriate.

18           And here, and we are not trying to create a  
19           parade of horrors, but to the extent that protected  
20           computer literally sweeps in any computer in the world minus  
21           U.S. contact, that would allow the CFAA to cover worldwide  
22           computer intrusion, and so what you need is some alleged  
23           U.S. connection.

24           In the *Expedia* case, the only defendant was  
25           the United States company, and the allegation there was

1 necessarily of a U.S. connection.

2 Here, in contrast, you have two international  
3 defendants, you have no specific allegation anywhere. And  
4 I don't need to repeat the exchange you had with plaintiff's  
5 counsel. There is just no specific allegation anywhere in  
6 the complaint of any defendant gaining unauthorized access  
7 or of any such actions happening in the U.S. or in Delaware.  
8 There is just very generalized language.

9 And so we believe that the pleading here is  
10 insufficient to rebut the presumption against extraterritorial  
11 application. Moreover, there is no sufficiently domestic  
12 conduct alleged to allow for this dispute to proceed on the  
13 current complaint. And for the reasons we identified earlier,  
14 we also believe that amendment is not appropriate.

15 I think just moving to that, that is kind of the  
16 CFAA kind of the framework that *Morrison* provides us to help  
17 work through whether or not this complaint sufficiently  
18 alleges a permissible application of the CFAA; and we  
19 respectfully submit it does not.

20 Turning I think to the main other issue that was  
21 on the table for the last exchange was about the sufficiency  
22 of Irish law here and whether or not, you know, essentially  
23 Irish law provides an adequate remedy.

24 I would just say, you know, we have met our  
25 burden by pointing to a complaint that they have filed

1     against us in Ireland. And I would just direct your  
2     attention, Your Honor, not simply to their letter that  
3     they attached to the complaint, which was helpful because  
4     it sketches out in detail their theories of how copyrights,  
5     intellectual property rights, and, most importantly,  
6     trespass and conversion provide essentially the same types  
7     of theory of the case and relief as are available under  
8     the CFAA. The CFAA is a federal trespass statute.

9             But I also would direct your attention to the  
10    exhibits that we attached to the declaration of our Irish  
11    counsel. This is Exhibit 1 to ECF 18. This is Ryanair's  
12    statement of claims against "booking" in the Irish case, and  
13    it goes in detail for paragraph and paragraph to all the  
14    remedies that they say they can get in Ireland for this  
15    conduct, including injunction, specific performance,  
16    damages, restitution, and miscellaneous. There is 28  
17    paragraphs of relief that they believe they can get in  
18    Ireland based on this claim. And there is simply nothing  
19    in the record that would allow us to conclude that there is  
20    not a remedy available in Ireland that otherwise would be  
21    available in the United States.

22            And that is, of course, what the forum non  
23    conveniens case law requires. It's not whether there is an  
24    identical cause of action but whether the same conduct could  
25    be addressed and remedied in other jurisdictions.

1           So for that reason, we believe we more than made  
2           the case for adequacy of Irish law.

3           I would finally note on prejudice, not only is  
4           there no reason to believe that they're not going to be able  
5           to obtain any relief to which they're entitled in Ireland,  
6           but there is also just no prejudice moreover because of  
7           the lack of pursuit of the case in Ireland.

8           So to the extent there is a sense that a stay  
9           would be unjust or that anything unjust is happening to  
10          Ryanair by any delay of this case or by moving the case to  
11          Ireland, I would just submit to the Court that that's just  
12          belied by the fact that there is a case sitting there for  
13          the last year-and-a-half that could have been used as a  
14          vehicle to address the perceived wrongs but that hasn't been  
15          used to do so.

16          And so with that, we would respectfully submit  
17          that the right answer here is to just dismiss this case both  
18          for forum non conveniens but also for failure to allege an  
19          impermissible application of the CFAA.

20          In the alternative, the Court should at least  
21          await guidance from the Supreme Court in *Van Buren* and  
22          permit the parties to submit a status report or supplemental  
23          brief after that decision to inform further proceedings in  
24          this case.

25          THE COURT: All right. Thank you. Just one

1 last question on the scope of the CFAA.

2 Opposing counsel points to the personal  
3 jurisdiction requirement which admittedly is not in the  
4 -- it's not part of the statute, but it is, of course, a  
5 requirement.

6 Shouldn't I view that as a necessary and  
7 appropriate limiting principle that would prevent some of  
8 the concerns that you have raised with the plaintiff's  
9 interpretation of the statute?

10 MS. HARTNETT: Your Honor, I appreciate the  
11 question. Actually, I think it may, as you say, address  
12 some concerns but certainly not all of them, because it  
13 would still allow the application of the CFAA to a foreign  
14 intrusion by a foreign actor.

15 I guess conceivably there could be situations  
16 where personal jurisdiction would prohibit that suit but  
17 others where it wouldn't, and I think the question really  
18 before the Court for the extraterritoriality analysis is  
19 whether -- not whether some other provision may help solve  
20 the issue but whether this presumption, which is a strong  
21 presumption against extraterritorial application, has been  
22 rebutted. So to the extent there is no context between, no  
23 allegation of a domestic act -- the act again is the  
24 intrusion. It is not the display on the website, it's not  
25 the selling of the ticket, it's the intrusion into the

1 computer. And to the extent those acts happened fully  
2 abroad without any direction or connection to the United  
3 States, the question is whether Congress meant to prohibit  
4 that as a violation of federal law.

5 And we would submit there is just no basis to  
6 believe that. And there is certainly no case that has held  
7 that a foreign intrusion of a foreign system like that is  
8 sufficient. There is no case standing for that because  
9 that case I guess has not yet been mounted or successfully  
10 brought until the attempt here.

11 THE COURT: Okay. Thank you. I want to thank  
12 both of you for the helpful argument. I'm going to take the  
13 motion under advisement. If we need anything further from  
14 you, of course we'll let you know.

15 Everybody, stay safe. And we will be in recess.  
16 Bye-bye.

17 (The attorneys respond, "Thank You, Your Honor.")

18 (Telephonic oral argument ends at 11:45 a.m.)  
19

20 I hereby certify the foregoing is a true and accurate  
21 transcript from my stenographic notes in the proceeding.

22 /s/ Brian P. Gaffigan  
23 Official Court Reporter  
24 U.S. District Court  
25